

# **ARBITRATION ADVISORY**

**2007-01**

## **ARBITRAL IMMUNITY**

**May 11, 2007**

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### **INTRODUCTION**

Under the Mandatory Fee Arbitration (MFA) statute and common law, MFA arbitrators and programs enjoy the same immunity as judicial officers, including immunity from civil liability for conduct in their quasi-judicial role, from being compelled to testify in another proceeding and from sanctions imposed by a court. However, when an arbitrator engages in acts or conduct outside of the normal arbitration process that are found to be "not integral" to the arbitration process, immunity may be lost. To avoid any potential loss of arbitral immunity provided by the MFA statute, the State Bar's MFA Committee recommends that programs and arbitrators adhere to the statutory and rule requirements imposed by the MFA program in all aspects of their handling of MFA cases.

### **DISCUSSION**

The Business and Professions Code provides that the bar association, the volunteers and the staff members who conduct and administer MFA hearings and programs enjoy the same immunity that protects judicial officers. The individuals protected by such immunity normally cannot be held liable for damages resulting from their arbitral activities. This immunity also protects the local bar associations, the MFA programs, and fee arbitrators and fee mediators from court-imposed sanctions and subpoenas compelling their attendance to testify in another proceeding.

Business and Professions Code § 6200(f) provides as follows:

"In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, an arbitrator or mediator, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings."

*See also, Olney v. Sacramento County Bar Assn.*, 212 Cal.App.3d 807, 814 [260 Cal.Rptr. 713] (1989); *Thiele v. RML Realty Partners*, 14 Cal.App.4<sup>th</sup> 1526 [18 Cal.Rptr.2d 416] (1993).

Although the statute that originally expressed that an arbitrator's immunity is the same as that of a judge was repealed in 1997 [C.C.P. § 1280.1], the expiration of that statute did not affect California common law arbitral immunity [*Stasz v. Schwab*, 121 Cal.App.4<sup>th</sup> 420, 430-431 [17 Cal.Rptr.3d 116] (2004)].

Since the purpose of both statutory and common law quasi-judicial arbitral immunity is to foster fearless and independent decision-making, the immunity shields all functions that are "integrally related" to the arbitral process, including the rendering of decisions that exhibit bias or prejudice [*Stasz v. Schwab, Id.*, at 431-432].

However, California case law has recognized an exception to arbitral immunity when the arbitrator breaches his or her contract with the arbitrating parties by failing to render a decision at all [*See, Baar v. Tigerman*, 140 Cal.App.3d 979, 983-986 [211 Cal.Rptr. 426] (1983)]. In addition, withdrawing from the arbitration process allegedly to coerce a settlement and offering to perform mediation services instead, if proven, also has been found to be an act not integrally related to the arbitration process and thus an act for which there may be no arbitral immunity [*Morgan Phillips, Inc. v. JAMS/Endispute*, 140 Cal.App.4<sup>th</sup> 795, 803 [\_\_\_ Cal.Rptr.3d \_\_\_] (2006)].

In *Baar*, plaintiff engaged the American Arbitration Association (AAA) and the arbitrator to conduct an arbitration proceeding. The arbitrator held 43 days of hearings during a four-year period. After expiration of an extended deadline and seven months after the final briefs were submitted, the arbitrator had yet to render a decision. Plaintiffs then filed a written objection to the award and subsequently filed a complaint against the arbitrator, who demurred on the basis of arbitral immunity. While the trial court sustained the demurrers, on appeal the appellate court sided with plaintiffs reasoning that although arbitrators' quasi-judicial capacity must be protected, arbitrators must also uphold their contractual obligation to the parties.

In *Morgan Phillips*, after presentation of evidence, the arbitrator conducted failed settlement talks. The plaintiff alleged that the arbitrator coerced plaintiff into an unfavorable settlement by withdrawing from arbitration rather than issue a binding award and instead offering to provide mediation services to the parties. The arbitrator failed to issue any award without stating a lawful justification for not doing so. The court, basing its reasoning on the exception established by *Baar*, stated that the rationale for the exception is purely common sense: the failure to render a decision is not "integral to the arbitration process" but rather is a breakdown of the arbitration process and that the failure to render an award at all is an abandonment of the duty to exercise fearless and independent decision-making.

In *Morgan Phillips*, which was decided at the demurrer stage, the Court of Appeal noted that arbitral immunity is available when the arbitrator withdraws due to ethical conflicts (e.g., conflicts of interest) or due to doubts about his or her ability to be impartial [*Id.* at 803, citing C.C.P. §§ 1281.9(a); 170.1(a)(6)(B)]. Under such circumstances, the decision to withdraw is deemed to be integrally related to the arbitration function and, therefore, arbitral immunity is not lost. If it were proven, as it was alleged, that the failure to make a decision was without lawful justification, however, then the failure may deprive an arbitrator of common law arbitral immunity.

It is not the purpose of this Advisory to provide a list of all the possible acts in which an MFA arbitrator or program may engage that may cause a loss of immunity. Rather, the MFA Committee believes that arbitrators and programs should take care to conduct all MFA proceedings within the applicable statutes, standards, procedures and guidelines in order that the potential for loss of arbitral immunity will be minimized as much as possible.

## **CONCLUSION**

The MFA Committee cautions that an arbitrator or program may lose its statutory and common law arbitral immunity by acting or failing to act in ways that are outside of the normal arbitration process that are not integrally related to the arbitration function. Case law establishes that an arbitrator's failure to render an award for no stated ethical reason, attempting to provide mediation services in the course of the arbitration hearing outside the program's mediation rules, or by engaging in other actions that either demonstrate a failure to fulfill his or her role as an arbitrator or that are not integrally related to the arbitration process, can subject the arbitrator or program to a suit for civil damages. Therefore, MFA fee arbitrators and programs should be careful to conform their conduct to all applicable statutory requirements of the MFA program and to local bar rules of procedure